BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JASON R. BRIN Claimant VS. **SMOKY HILL TANK SERVICE** Respondent AND **EMASCO INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,064,229

ORDER

STATEMENT OF THE CASE

Claimant requested review of the July 12, 2013, preliminary hearing Order entered by Special Administrative Law Judge C. Stanley Nelson. Melinda G. Young of Hutchinson, Kansas, appeared for claimant. Richard L. Friedeman of Great Bend, Kansas, appeared for respondent and its insurance carrier (respondent).

The Special Administrative Law Judge (SALJ) found claimant failed to sustain his burden of proof that his injury on December 20, 2012, arose out of and in the course of employment. The SALJ concluded that because at the time of his injury claimant was driving his own vehicle from his home to respondent's shop, claimant was not paid mileage for his travel to and from respondent's shop, and claimant was on his way to assume the duties of employment, claimant is excluded coverage by the Workers Compensation Act (Act) by the "going and coming" rule.

The record on appeal is the same as that considered by the SALJ and consists of the transcript of the March 22, 2013, Preliminary Hearing and the exhibits; and the June 3, 2013, Continuation of Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues travel was an inherent part of his employment; therefore, claimant was in the course and scope of his employment at the time of his motor vehicle accident.

Respondent maintains claimant's motor vehicle accident is not compensable under the Act as claimant was traveling on a public road from his home to his work site outside the course of his employment. Respondent argues claimant was on the way to work and subjected only to the same risks or hazards as those to which the general public is subjected.

The sole issue for the Board's review is: Did claimant's accidental injuries arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant began employment with respondent on November 10, 2012, as a tank truck driver. Claimant drove a semi truck with a tank on the back, hauling liquids to and from various locations. Claimant testified he would leave his home in Plainville, Kansas, each working morning and travel in his personal vehicle approximately 16-17 miles to respondent's shop in Natoma, Kansas, to retrieve the company tank truck. The company truck was stored at respondent's shop in Natoma, Kansas, every day when not in use. Claimant required the use of the company truck to perform his job duties.

Claimant testified he was paid for his time beginning when he left his home each day through when he returned home, in addition to his regular working hours. He stated respondent specifically agreed to pay for his fuel to travel to and from work as a condition of hire, and this was compensated by increasing claimant's hourly wage from $17.00 per hour to $18.50 per hour. Claimant agreed he did not submit nor receive mileage reimbursement, nor did he provide transportation for other employees.

Joel Stull, a principal with respondent, testified he denied claimant's request for fuel reimbursement. He stated he would pay "[$]18.50 per hour, truck time, and that's it, nothing else."[1] Mr. Stull agreed the increase in pay was an accommodation for the fuel charge claimant requested. Mr. Stull denied agreeing to pay claimant for his time traveling between his home and respondent's shop.

Respondent guaranteed claimant 40 hours per week regardless of whether the actual driving and contract hours equaled 40 hours. Claimant completed time sheets provided by respondent in addition to the Driver's Daily Log required by the Department of Transportation. Claimant also recorded his time in a personal calendar.

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[1] P.H. Trans. (Mar. 22, 2013) at 28.

On the morning of December 20, 2012, claimant was driving his personal vehicle on Highway K-18 toward respondent's shop when he lost control of his vehicle on the icy road. Claimant was transported from the scene of the accident to Emergency Medical Services, and later released to return home. On December 25, 2012, claimant returned to Emergency Medical Services, where it was determined he suffered a compression burst fracture of the T12 vertebral body with 50 percent loss of height. He was taken off work and referred to Hays Medical Group, where he was prescribed medication and the use of a back brace. Claimant testified he was eligible for surgery, but declined, as he was informed he would have the same results from bed rest and utilizing the back brace.

Claimant was released to return to work with restrictions on March 12, 2013. Restrictions included a lifting limit of 15 pounds; avoidance of bending, twisting, and stooping; and no walking more than 15 minutes at a time. Claimant testified he has an occasional job assisting in cleaning a friend's shop part-time. Further, claimant stated he has not worked for respondent since December 25, 2012, when his employment was terminated. Respondent has no record of claimant's working hours after December 16, 2012. Respondent contends claimant never submitted time sheets for hours worked after that date.

PRINCIPLES OF LAW

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[3]

K.S.A. 2012 Supp. 44-508(f)(3)(B) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in

[2] K.S.A. 2012 Supp. 44-501b(c).

[3] K.S.A. 2012 Supp. 44-508(h).

> dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[5]

ANALYSIS

Generally, if an employee is injured while on his or her way to assume the duties of employment or after leaving such employment, the injuries are not considered to have arisen out of and in the course of employment under K.S.A. 2012 Supp. 44–508(f)(3)(B). This rule is known as the "going and coming" rule.[6] The rationale for the "going and coming" rule was explained in *Thompson*:[7] "[W]hile on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment. [Citations omitted.]" "'[T]he question of whether the 'going and coming' rule applies must be addressed on a case-by-case basis.' [Citation omitted.]"[8]

K.S.A. 2012 Supp. 44-508(f)(3)(B) is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[9]

K.S.A. 2012 Supp. 44-508(f)(3)(B) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the

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[4] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[5] K.S.A. 2012 Supp. 44-555c(k).

[6] See *Chapman v. Beech Aircraft Corp.*, 20 Kan. App. 2d 962, 894 P.2d 901, *aff'd* 258 Kan. 653, 907 P.2d 828 (1995).

[7] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[8] *Chapman v. Beech Aircraft Corp.,* 20 Kan. App. 2d at 964; see *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, Syl. ¶ 3.

[9] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

employer's premises.[10] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[11]

In addition to the specific language contained in K.S.A. 2012 Supp. 44-508(f)(3)(B), Kansas courts have long recognized an exception to the "going and coming" rule where travel is an intrinsic part of the employee's job.[12] Our Supreme Court noted that when travel becomes an intrinsic part of the job it is an element of employment.[13] The SALJ spent a considerable amount of time in his Order discussing this issue and it will not be repeated in this Order.

The cases in which the intrinsic travel exception apply involve employments where the job site changes; e.g., construction sites and oil field operations. These cases are thoroughly examined in the SALJ's order. The intrinsic travel exception does not apply in this case. The evidence shows that claimant was simply commuting to work. Claimant was on the way to assume the duties of employment. The location of the accident was not on the premises owned or under the exclusive control of the employer, nor was it on the only available route to or from work. There was no special risk or hazard connected with claimant's drive to work that was not a risk or hazard to which the general public was exposed.

CONCLUSION

Claimant claim for compensation is barred by K.S.A. 2012 Supp. 44-508(f)(3)(B). Claimant has failed to prove by a preponderance of the evidence that his accidental injuries arise out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Special Administrative Law Judge C. Stanley Nelson dated July 12, 2013, is affirmed.

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[10] *Thompson*, 256 Kan. 36, Syl. ¶ 1. The court held that the term "premises" is narrowly construed to be an area controlled by the employer.

[11] *Thompson*, 256 Kan. at 40.

[12] *Scott v. Hughes*, 294 Kan. 403, 414, 275 P.3d 890, citing *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006); *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 277, 899 P.2d 1058 (1995).

[13] *Sumner v. Meier's Ready Mix, Inc*., 282 Kan. 283, 289, 144 P.3d 668 (2006).

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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C. Stanley Nelson, Special Administrative Law Judge